82-238

FILED
AUG 19 1982
ALEXANDER L. STEVAS
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. -

MARION DALE FLEWALLEN,
*Petitioner,*
*v.*
GORDON FAULKNER,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NILE STANTON
Attorney at Law
21 North Pennsylvania Street
Fourth Floor
Indianapolis, Indiana 46204
(317) 636-3300
*Counsel for Petitioner*

Central Publishing Company, Inc., Indianapolis, IN 46206

## QUESTIONS PRESENTED

Whether the petitioner was denied his Sixth and Fourteenth Amendment rights to confrontation where the State made "wholesale use of prior testimony and out-of-court statements" which were not subject to the protection of oath, demeanor, and cross-examination.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Constitutional Provisions | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 10 |
| Conclusion | 18 |
| Affidavit of Service | 19 |
| Appendix: | |
| A. Opinion of the Seventh Circuit Court of Appeals | A-1 |
| B. Order of May 10, 1982, of the Seventh Circuit Court of Appeals | A-8 |
| C. Entry of July 15, 1981, the United States District Court for the Southern District of Indiana | A-9 |
| D. Opinion of the Supreme Court of Indiana | A-13 |

## TABLE OF AUTHORITIES

*Cases:* Page

*California v. Green*, 399 U.S. 144, 90 S.Ct. 1930 (1970) ..... 11, 12, 13, 14, 15, 16, 17, 18

*Flewallen v. Faulkner*, 677 F.2d 610 (1982) ..... 10

*Flewallen v. State*, 269 Ind. 70, 368 N.E.2d 239 (1977) ..... 9, 14, 17, 18

*Kirby v. United States*, 147 U.S. 47, 55-56 (1899) .... 11

*Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339 (1895) ..... 18

*Pointer v. United States*, 380 U.S. 403, 85 S.Ct. 1065 (1968) ..... 11

*State v. Saporen*, 205 Minn. 358, 362 285 N.W. 898, 901 (1939) ..... 16, 17

### AMENDMENTS TO UNITED STATES CONSTITUTION

Sixth Amendment ..... 2, 10, 11

Fourteenth Amendment ..... 2, 10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. -

| | |
|---|---|
| MARION DALE FLEWALLEN, | ) |
| | ) |
| *Petitioner,* | ) |
| | ) |
| *v.* | ) |
| | ) |
| GORDON FAULKNER, | ) |
| | ) |
| *Respondent.* | ) |

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 677 F.2d 610. It is reprinted in the Appendix, *infra*, App. A.

The opinion of the United States District Court for the Southern District of Indiana is unreported but is reprinted in the Appendix, *infra*, App. C.

The opinion of the Indiana Supreme Court is reported at 289 Ind. 70, 338 N.E.2d 239. It is reprinted in the Appendix, *infra*, App. D.

## JURISDICTION

This Habeas Corpus action, brought pursuant to 28 U.S.C. §2254, commenced in the United States District Court for the Southern District of Indiana. Habeas corpus relief was denied on July 15, 1981. *See*, Order of July 15, 1981; App. C, *infra*. Furthermore, all State remedies had previously been exhausted. *See*, 368 N.E.2d 239 (Ind. 1977); App. B, *infra*.

On May 10, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. *See*, Order of May 10, 1982; App. B, *infra*. This Resultant petition for writ of certiorari is filed within the ninety (90) day time limit imposed by law. *See*, *Riddle v. Dyche*, 262 U.S. 333, 335-6 (1923). The jurisdiction of this Court is therefore invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the United States Constitution are as follows:

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.

Amendment XIV:...nor shall any state deprive any person of life, liberty, or property, without due process of law;...

## STATEMENT OF THE CASE

On September 10, 1974, the Vanderburgh County, Indiana, Grand Jury indicted petitioner Marion Dale Flewallen for the crime of Second Degree murder in connection with the death of Erica R. Gribsby, the four-year old daughter of Flewallen's wife, Virginia Winona Flewallen. *[R. at 12]. Flewallen entered a special plea of "temporary insanity" on December 5, 1975. [R. at 60]. Flewallen's trial lasted from March 16, 1976, until March 25, 1976, at which time the jury returned a verdict of guilty of Second Degree Murder, and sentenced him to life imprisonment. [R at 136].

The following relevant facts were adduced by the evidence presented by the State of Indiana at petitioner's trial:

Dr. Albert Venables, the pathologist who performed the autopsy on the dead child, testified that the cause of death was "bleeding from a puncture wound of the heart produced by a broken rib." [R. at 191]. The time of death was stipulated to be 5:59 P.M. on August 30, 1974. [R. at 193]. Dr. Venables further testified that there were indications of other "traumas" on the body of the victim which, in his opinion, occurred approximately two days prior to the child's death. These traumas were described as bruises on the chest and buttocks and a cut on the inside of the lip. [R. at 192-199]. Dr. Venables testified that in his opinion, the injury which brought about the child's death was delivered by a forcible blow with a soft object, possibly a hand, and that the injury could not, in his opinion, have been the result of an accidental fall. [R. at 200.]

Commencing with the testimony of state's witness Bonnie Barnett, the State of Indiana was allowed to

---

*[R. at ___] refers to page citations in the duly certified and transcribed "Record of Proceedings" of petitioner's trial filed with the Indiana Supreme Court, Cause No. 976 S 304.

introduce over defense objection, various extrajudicial prior statements made by six different state's witnesses. *All of these statements were admitted as substantive evidence.* The following objection was made by defense counsel to the introduction of Barnett's entire Grand Jury testimony. (State's Exhibit #11) and "voluntary" police statement (State's Exhibit #12):

> Mr. Rice: Yes, and I would object to both of them and include in my objection the same one that I made on a prior occasion, and supplement the objection by stating that it violates the defendant's Constitutional rights as enunciated by the Sixth Amendment to the United States Constitution. And also, for the reason that at least the Grand Jury minutes contain inadmissible statements, statements that would be inadmissible in Court...
>
> * * * * *
>
> By Court: I've noted that objection, Mr. Rice. And let the record reflect that the objection is overruled.

[R. at 395-6]. Defense counsel did admit that State's Exhibit #12, the police statement, seemed not to contain any inadmissible evidence, but renewed his objection on constitutional grounds. [R. at 396].

The substance of Barnett's police statement was that on the day of the child's death she observed Virginia Winona Flewallen, outside of her apartment building, holding a "limp baby", and saying, "Oh my God, help me. Oh my God, help me," and that she then saw a neighbor take Mrs. Flewallen to the hospital. Barnett also indicated in her statement that she saw a neighbor take Mrs. Flewallen to the hospital. Barnett also indicated in her statement that she saw a man, identified as Flewallen, run down the sidewalk "real fast" at the same time that the mother was getting in the car with the child. [R. at 397]. In addition, she

told the police that two days prior to the little girl's death, she had looked from apartment across to the Flewallen's apartment and had seen the Flewallens fighting and heard the mother scream, "Don't hurt my baby, don't kill it." [R. at 397].

During the reading of Barnett's Grand Jury testimony, defense counsel was forced to object to various questions and answers by interupting the prosecutor as he read the transcript to the jury. On re-direct examination, over defense objection, the State was permitted to introduce into evidence Bonnie Barnett's prior extrajudicial statement to the coroner. [R. at 439].

State's witness Golda Willis was merely asked to identify herself before being asked to authenticate her written statement given previously to the Evansville Police (State's Exhibit #15). Over timely defense objection on Sixth Amendment grounds, Willis' statement was admitted into evidence. [R. at 441]. The statement was read to the jury by the prosecutor. Willis' testimony before the Vanderburgh County Grand Jury (State's Exhibit #15) was read to the jury in like manner immediately following the reading of the police statement. [R. at 448]. Once again, defense counsel was permitted to object to some of the questions and answers contained in both documents during the course of the prosecution's recitation. The substance of Golda Willis' statements was that on the day of the child's death, she saw Virginia Winona Flewallen running out of her apartment with a limp child in her arms, crying "Oh my God, help me. God, help me." Mrs. Flewallen and the child then got into a car with a Mr. and Mrs. Harris and drove away. [R. at 451-53].

Shortly thereafter, Ms. Willis saw Marion Flewallen exit has apartment and walk off in the opposite direction. [R. at 453]. Ms. Willis also stated that she had previously seen the defendant strike the child. [R. at 455]. It is noteworthy that even questions asked the witness by various grand jurors

were read to the jury by the prosecutor. [R. at 457]. The only questions which the prosecutor asked Ms. Willis directly were merely repetitions of questions contained in the extrajudicial statements.

Promptly upon assuming the witness stand, state's witness Virginia Winona Flewallen, the mother of the dead child, was asked to authenticate her prior statement to the Evansville police (State's Exhibit #16), and testimony before the Vanderburgh County Grand Jury (State's Exhibit #17). Both exhibits were admitted over defense objection. [R. at 473-4]. The substance of Mrs. Flewallen's lengthy statements were that soon after she married the defendant, he began to abuse and beat the child frequently. Her statements indicated that on the day of the child's death she was upstairs in the family's apartment. At the time, it was her belief that Flewallen had just left the apartment, and that the child was downstairs alone. Presently she heard a noise. She ran downstairs and found the child lying at the bottom of the stairs [R. at 516]. She then picked the child up, ran out the door carrying it in her arms, and found a couple named Harris to take her and the child to the hospital. [R. at 516-19]. The defendant arrived at the hospital shortly thereafter. She stated that she told him the child was dead, and that after she told him, "Sweat started pouring off him and he kept saying 'No, no, no.'" [R. at 521]. During her appearance before the Grand Jury, the following exchange occurred between one of the grand jurors and Mrs. Flewallen:

Q Do you still think she fell down the steps?

A No.

Q What do you think now?

A I think he might have done it.

Q He might have done it?

A And, he did, because I know I didn't.

[R. at 531].

The prosecutor, on direct examination and over defense objection, used her answers to the above questions to impeach Mrs. Flewallen after she testified in open court that she believed that the child died by accidentally falling down the steps. [R. at 584]. She explained this inconsistency by stating that she had made the previous statements implicating her husband because she was afraid that she would be blamed for the death, put in prison, and have her unborn child eventually taken away from her. [R. at 583]. The prosecution later brought out during the direct examination that she had in fact plead guilty to the crime of Cruelty to a child in connection with her daughter's death. [R. at 666].

State's witness Sally Quackenbush was merely asked by the prosecutor to authenticate her prior statement to the Evansville Police (State's Exhibit #27), and her previous testimony to the Vanderburgh County Grand Jury (State's Exhibit #28). [R. at 755]. Both documents were admitted as substantive evidence over defense objection. [R. at 755-6], and the prosecutor was permitted to read the transcripts of both exhibits to the jury. The relevant portions of Ms. Quackenbush's statements described her view of the defendant leaving his home and walking down the state on the afternoon of the child's death. [R. at 764]. Defense counsel was allowed to object to particular questions as the prosecutor was reading the transcripts, and some objections were in fact sustained.

State's witness Linda Reed testified that two days prior to the child's death, Virginia Winona Flewallen had brought the child over to her apartment, stated that the defendant had beaten the child and herself, and asked if they could spend the night. [R. at 772-3]. Mrs. Reed related that she observed bruises on the child's bottom, and that Mrs. Flewallen had a "big knot". Both mother and daughter spent the night with Mrs. Reed. [R. at 773].

The Grand Jury testimony of Tina Shelton, (State's Exhibit #29), was admitted as substantive evidence, over defense objection. [R. at 787]. The prosecutor was then allowed to read the entire transcript of her testimony to the jury. Defense counsel was permitted to interrupt the prosecutor's recitation for the purpose of making objections to certain questions, and some of his objections were sustained by the Court. Ms. Shelton related to the Grand Jury an instance prior to the child's death where the defendant had abused the child [R. at 803], and that she had noticed bruises on the child on one occasion. [R. at 807].

State's witness Carolyn Phillips testified that she had once kept the child, Erica, for a two-day period, and that she had seen bruises on the child's head. [R. at 824]. She also testified that she had seen writing on the child's crib which read "Erica is a monster." [R. at 834]. Upon refreshing her memory by reviewing her Grand Jury testimony, Ms. Phillips testified that during the period when Erica was staying with her, she also observed "cuts on her bottom caused by a ring." [R. at 835]. The transcript of Ms. Phillips' Grand Jury testimony was never actually admitted into evidence.

State's witness Paul Boner testified that he had once observed the child's bed with the words "Erica is a monster" inscribed on the headboard. [R. at 842].

Debra Grigsby, a witness called by the State, testified that she had once seen the child with blackened eyes and infected and apparent burns on her back. [R. at 852].

State's witness Virginia Gallion, Virginia Flewallen's mother, was asked by the prosecutor, shortly after taking the witness stand, to authenticate her prior statement to the Evansville Police (State's Exhibit #31), and a transcript of her previous testimony before the Vanderburgh County Grand Jury. [R. at 862-3]. Both documents were admitted as substantive evidence over the defendant's objection, and the prosecutor was allowed to read the documents to the

jury. [R. at 863]. Defense counsel was required to object to particular questions by interrupting the prosecutor during the course of the prosecutor's recitation of the witness' prior statements. Some of his objections were sustained. In the transcripts, Ms. Gallion outlined her daughter's general background, revealing that the deceased child had once been taken that two days prior to the child's death she had observed no marks or bruises on the child's body, although she had seen the child with bruises on prior occasions. [R. at 886-7].

The rest of the evidence presented by the state was mostly corroborative and not relevant to the issue present to this Court.

The case for the defense consisted of testimony by a psychiatrist and psychologist relating to the defendant's sanity at the time of the alleged offense. In addition, two court-appointed psychiatrists testified concerning the defendant's mental state at the time of the alleged offense, pursuant to a requirement under Indiana statute in cases where the defense of insanity is interposed. It is sufficient to say that much of the medical evidence was conflicting. None of the medical evidence is relevant to the issue presently before this Court.

On June 11, 1976, the petitioner filed a "Motion to Correct Errors" alleging the violation of his right to confrontation. Said motion to correct errors was promptly overruled by the trial court. [R. at 192]. The aforementioned overruling of petitioner's "Motion to Correct Errors" was duly appealed to the Supreme Court of Indiana. The Indiana Supreme Court held that the petitioner was not denied his constitutional right to confrontation and therefore his conviction was affirmed. *See*, Appendix, *Flewallen v. State*, (1977) 267 Ind. 90, 368 N.E.2d 239.

The petitioner's state remedies having been exhausted, petitioner filed for a Writ of Habeas Corpus in the United States District Court for the Southern District of Indiana

pursuant to 28 U.S.C. §2254(c). The sole issue before the District Court was whether or not the petitioner had been afforded his right to confrontation. On July 15, 1981, the District court denied the petition for Writ of Habeas Corpus after considering it upon the merits. (*See*, Entry of July 15, 1981, *See* Appendix).

Petitioner continued his quest for justice by appealing the District Court's Order to the United States Court of Appeals for the Seventh Circuit. Jurisdiction was vested in the court pursuant to 28 U.S.C. §2253 and 28 U.S.C. §2254. Once again, confrontation was the sole issue presented for review.

On May 10, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court using the following language:

> In conclusion, although we do not condone or encourage use of the procedure challenged here, in the absence of any demonstrated or apparent prejudice to Flewallen occasioned by its use, we conclude that Flewallen's Sixth Amendment rights were not abridged. Thus, the judgment of the district court is AFFIRMED.

*Flewallen v. Faulkner*, 667 F.2d 610 (1982), *See*, Appendix.

The instant petition for Writ of Certiorari seeks review of the aforementioned decision of the United State's Court of Appeals.

## REASONS FOR GRANTING THE WRIT

This petition provides the Court with the opportunity to clarify the parameters of an accused's right to confrontation. If a writ of certiorari is granted in this cause, the sole substantive issue presented for review will be whether or not the petitioner was afforded his Sixth and Fourteenth Amendment rights to confront his accusers. The petitioner contends that the Indiana Supreme Court,

the United States District Court, and the United States Court of Appeals for the Seventh Circuit misconstrued the concept of confrontation and thus erred in holding that the petitioner was afforded an adequate opportunity to confront his accusers at trial.

In determining the propriety of the procedures used at petitioner's trial, one must first look to the language of the Sixth Amendment. The Sixth Amendment, in pertinent part, reads as follows: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." This right to confrontation has been aptly described by this Court as "[o]ne of the fundamental guarantees of life and liberty." *Kirby v. United States*, 174 U.S. 47, 55-56, (1899). Furthermore, after much consideration was given to the fundamental nature of the confrontation clause, this Court held that the right to confrontation is essential to preserving due process of law and must therefore be protected throughout the states via the Fourteenth Amendment. *Pointer v. United States*, 380 U.S. 403, 85 S.Ct. 1065 (1968).

Although many cases have interpreted the confrontation clause, *California v. Green* is the Court's leading case on the right to confrontation. *California v. Green*, 399 U.S. 144, 90 S.Ct. 1930 (1970). In *Green*, a sixteen-year-old boy was arrested for selling marijuana to an undercover police officer. The boy named Green as his supplier and so testified at Green's preliminary hearing. At said preliminary hearing, the youth was extensively cross-examined by Green's trial attorney. At trial, however, the youth claimed that he could not remember whether or not Green was his supplier. This uncertainty was ostensibly due to the youth's ingestion of a quantity of LSD. Upon motion by the State, the trial court admitted the youth's preliminary-hearing testimony into evidence. The preliminary-hearing testimony was admitted as substantive evidence of Green's guilt and not merely for impeachment purposes.

Green was ultimately convicted and he subsequently appealed claiming that the introduction of the preliminary-hearing testimony violated his right to confrontation. In reviewing the propriety of the complained of procedure, this Court held that an accused's right to confrontation:

> 1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
>
> 2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of the truth";
>
> 3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

*California v. Green*, 399 U.S. at 158, 90 S.Ct. at 1935 (1970).

This Court determined that the above-enumerated requirements for adequate confrontation were satisfied by the procedures used at Green's trial. *California v. Green*, 399 U.S. at 164, 90 S.Ct. at 1938. The Court noted that since the State's witness told one version of the critical events at the preliminary hearing and a conflicting version at trial, the oath and demeanor requirements of confrontation were satisfied. *California v. Green*, 399 U.S. at 159, 90 S.Ct. at 1935. The Court reasoned that since the trier of fact was made aware of the conflicting sets of testimony, the observance of the witness's demeanor under oath as he gave his in-court testimony had allowed the trier of fact to adequately assess the veracity of his preliminary-hearing testimony. *California v. Green*, 399 U.S. at 159-60, 90 S.Ct. at 1935.

In examining the adequacy of the cross-examination of the State's witness, the Court decided that the cross-examination in question passed muster for two reasons. First, the Court noted that the purpose of cross-

examination is to shake the reliability of the witnesses' story and to demonstrate that another interpretation of the facts is possible. This Court determined that since the youth's two sets of testimony were in sharp conflict and since his testimony at trial was favorable to the defendant, the witness himself had accomplished more than can be hoped for during normal contemporaneous cross-examination. *California v. Green*, 399 U.S. at 159, 90 S.Ct. at 1935. The Court then held that irrespective of the youth's testimony at trial, the admission of the preliminary-hearing testimony was proper in that Green's trial attorney was able to secure full and effective contemporaneous cross-examination of the youth's testimony during the preliminary hearing. *California v. Green*, 399 U.S. at 165 90 S.Ct. at 1938. The Court decided that the cross-examination at the preliminary hearing produced circumstances which closely approximated those of the typical trial. *Id.* Therefore, the lack of effective cross-examination at trial was remedied by the petitioner's ability to have the full-blown cross-examination from the preliminary hearing introduced at trial. *Id.*

In the instant case, however, the petitioner was not afforded adequate confrontation. Although the facts of the instant case are superficially similar to those of *Green*, a close inspection reveals that none of the three aforementioned requirements of confrontation, i.e., oath, demeanor, and cross-examination, were satisfied by the procedures used at petitioner's trial.

The challenged procedure, used over petitioner's strenuous objections, is best summarized in the dissenting opinion of Justice DeBruler of the Indiana Supreme Court. Justice DeBruler described the petitioner's trial as follows:

> This case involves the wholesale use of prior testimony and out-of-court statements of less than enthusiastic prosecution witnesses during their direct examination. Five statements given by witnesses to

> the police, one statement to the coroner, and six sets of grand jury testimony were read, virtually in their entirety, to the jury during the examination of six witnesses. The extrajudicial statements of two of the witnesses were introduced and read only after those witnesses had been questioned as to the events involved and had professed difficulty in remembering those events. *The remaining four witnesses were simply called to the stand for the purpose of authenticating their respective statements and testimony, which were read to the jury before these witnesses were asked any questions about the events surrounding the death of Erica Grigsby.*

*Flewallen v. State*, 368 N.E.2d 239, 243 (1977, DeBruler J. dissenting, original emphasis).

When one applies the analysis used in *Green* to the facts of the petitioner's case, it is apparent that an egregious violation of petitioner's constitutional rights occurred. In *Green*, the confrontation requirements of oath and demeanor were satisfied by the State's witness' subjection to a formal oath at the time that he made his challenged statements and by the fact that the witness completely contradicted his pretrial statements with his at-trial testimony. *California v. Green, supra.* In the case at bar, however, there was no dramatic and inexplicable pro-defense shift in the witnesses' testimony. *Flewallen v. State*, 368 N.E.2d at 241. The erroneously admitted pre-trial declarations "were consistent with the statements given by the witnesses on the stand, though the previous statements were more detailed in each case." *Id.* Therefore, instead of the trier of fact being able to observe the demeanor of a witness who has substantially changed his story, the jury in the petitioner's case merely observed witnesses who claimed to have forgotten most of the details of their previous statements. The jury had no way in which to evaluate the veracity of the out-of-court statements. The jury's only natural conclusion would be to assume that the

prior statements were true and that the passage of time had merely blurred otherwise accurate memories. Unfortunately, this natural conclusion destroys the very essence of confrontation.

Furthermore, six of the challenged statements in the instant case were never made pursuant to an oath and thus the declarants were never impressed "with the seriousness of the matter" and the "possibility of a penalty for perjury." *California v. Green*, 399 U.S. at 158, 90 S.Ct. at 1935. This total absence of the safeguard of an oath on six of the detailed statements which were read at trial is in marked contrast to the statements which were admitted in *Green*. In *Green*, each of the statements which this Court ruled the admission of which did not violate Green's right to confrontation were sworn statements given during a formal preliminary hearing made under oath in "circumstances which closely approximated those of the typical trial." *California v. Green*, 399 U.S. at 165, 90 S.Ct. at 1938. The State cannot seriously contend that informal statements given to police officers or the coroner were given under circumstances which closely resembled a full blown adversarial proceeding. Therefore, since the witnesses against the petitioner did not dramatically shift their testimony to favor the petitioner and since many of their pre-trial statements, which were admitted without in-court substantiation, were never made pursuant to an oath, the confrontation clause components of oath and demeanor cannot be said to have been satisfied.

The final component of confrontation is cross-examination. Absent "full and effective" cross-examination, the proceedings at trial cannot pass muster under the Constitution. *California v. Green*, 399 U.S. at 158, 90 S.Ct. at 1935.

In the petitioner's case as well as in *Green*, the jury was not afforded the opportunity to observe the State's witnesses being cross-examined as they made their pre-

trial declarations. Instead, the respective trial courts allowed the State to substitute subsequent cross-examination for contemporaneous cross-examination. In *Green*, this Court determined that "[t]he main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witnesses' '[f]alse testimony is apt to harden and become unyielding to the blows of truth as the witness has the opportunity for reconsideration and influence by the suggestion of others, who's interest may be, and often is, to maintain falsehood rather than truth.'" *California v. Green*, 399 U.S. at 160, 90 S.Ct. at 1936 (*quoting, State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939)).

This Court concluded that the trial Court in *Green* averted the above-described danger for two reasons. First, this Court noted that "[t]he most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant." *California v. Green*, 399 U.S. at 159, 90 S.Ct. at 1935. Second, and most importantly, this Court held that since the challenged declarations in *Green* were made at a formal, adversarial preliminary hearing which closely approximated the circumstances of a "typical trial", the perils of the absence of contemporaneous, at-trial cross-examination of the declarations were negated. *California v. Green*, 399 U.S. at 185 S.Ct. at 1938.

The facts of the instant case do not support such a holding. As previously discussed, there was no pro-defense shift in testimony. It cannot seriously be contended that the fact that the witnesses forgot some of the incriminating details of their prior statements accomplished more in the presence of the jury than "[t]he most successful cross-examination at the time the statement[s][were] was made."

*California v. Green*, 399 U.S. at 159, 905 S.Ct. at 1935. Instead, it is much more likely that the trier of fact would merely assume the veracity of the out-of-court declarations and would attribute the defects in memory to the ravages of time. Therefore, adequate confrontation was not salvaged by the content of the witnesses' testimony at trial.

Finally and most strikingly, the challenged declarations introduced against the petitioner were definitely not given under circumstances closely approximating those of a trial. Moreover, the petitioner did not have an opportunity to cross-examine the declarants as they made their out-of-court statements. This is not a case of the admission of testimony given under the penumbra of a formal preliminary hearing where competent counsel represent all parties. This is, instead, a case of the admission of "[f]ive statements given by witnesses to the police, one statement to the coroner, and six sets of Grand Jury testimony." *Flewallen v. State*, 368 N.E.2d 239, 243. In not one instance were the declarants subjected to any cross-examination as they made their pre-trial statements nor was the petitioner afforded the right to such cross-examination. Furthermore, the petitioner was not even allowed to be present during the questioned declarations.

This is definitely a case where "[f]alse testimony is apt to harden and become unyielding to the blows of truth." *California v. Green*, 399 U.S. at 159, 90 S.Ct. 1935 (*quoting, State v. Saporen*, 205 Minn. 358, 362, 285 N.W. 398, 901 (1939)). There was no changing testimony or functional equivalent of contemporaneous cross-examination to insure against the dangers of "substituting subsequent for timely cross-examination". In short, there was no "full and effective" cross-examination of the out-of-court declarations which were admitted as substantive evidence against the petitioner. If a witness cannot remember the factual basis for his statements, how can petitioner be said to have had the requisite opportunity "not only of testing the

recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief". *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339 (1895).

In conclusion, the petitioner contends that *California v. Green* was never intended to emasculate one's constitutional right to confrontation to the point of "reliev[ing] the State of the obligation to make any attempt to prove its case through the testimony of sworn witnesses given in open court where the trier of fact can observe their demeanor and where cross-examination takes place more or less contemporaneously with the testimony's recreation." *Flewallen v. State*, 368 N.E.2d at 243. (DeBruler J. dissenting). The State's tactics guaranteed that none of the key witnesses against the petitioner were subjected to the three requisite confrontation components of oath, demeanor, and cross-examination. The trial court's failure to insure the petitioner's right to confrontation is an error of such magnitude that justice demands the reversal of petitioner's conviction and a clarification of the parameters of the confrontation clause.

## CONCLUSION

For all of the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NILE STANTON
Attorney at Law
Fourth Floor
21 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 636-3300

*Counsel for Petitioner*

## AFFIDAVIT OF SERVICE

I, Nile Stanton, first being duly sworn upon my oath, do depose and that 40 copies of the foregoing petition have been served upon the Clerk of the Supreme Court of the United States Supreme Court, and 3 copies have been sent to Mr. Linley E. Pearson, Indiana Attorney General, 219 State House, Indianapolis, Indiana 46204, all by United States certified mail this ____ day of August, 1982.

NILE STANTON

# Appendix A

In the

## United States Court of Appeals

For the Seventh Circuit

No. 81-2323
MARION DALE FLEWALLEN,

*Petitioner-Appellant,*

v.

GORDON FAULKNER,

*Respondent-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 78-C-77—William E. Steckler, *Judge*

SUBMITTED APRIL 20, 1982*—DECIDED MAY 10, 1982

Before WOOD, ESCHBACH, and POSNER, *Circuit Judges.*

PER CURIAM. Petitioner-appellant, Marion Dale

* This appeal was set for argument on April 20, 1982. Counsel for petitioner-appellant apparently was unable to appear and counsel for respondent-appellee, who was notified too late and did appear, orally waived argument. Consequently, this appeal is submitted for decision to the panel for April 20 on the briefs and the record. *See* Fed.R.App.P. 34(e).

Flewallen, appeals from the denial of his petition for a writ of habeas corpus, which raised only one ground for relief: that at his trial Petitioner was denied the right "to be confronted with the witnesses against him..." guaranteed by the sixth amendment. Specifically, Flewallen challenges the admission into evidence, over his vigorous objections at trial, of six prosecution witnesses' out-of-court statements as part of the State's case-in-chief. We affirm.

After a jury trial, Flewallen was convicted of the second degree murder of eighteen-month-old Erica Grigsby, the daughter of his wife, Virgina, from a former marriage, and sentenced to life imprisonment. The evidence is adequately summarized in the opinion of the Indiana Supreme Court which, with one justice dissenting, affirmed Flewallen's conviction, rejecting, *inter alia*, the argument presented in the instant habeas proceedings. *See Flewallen v. State*, 267 Ind. 90, 368 N.E.2d 239, 240 (1977).

At Flewallen's trial, the prosecutor was permitted to admit into evidence, and to read from, transcripts of the six prosecution witnesses' out-of-court statements. The reason for the prosecutor's use of these out-of-court statements in lieu of the witnesses' direct testimony at trial is not apparent from the record. Before each transcript was admitted the declarant examined it and verified its accuracy. Flewallen does not contend either that the statements were not made or that the transcripts admitted at trial were inaccurate.

Although not all of these kinds of statements were admitted with respect to each of the six witnesses, three kinds of challenged statements were admitted into evidence; grand jury testimony; statements to police investigators given shortly after the crime; and a statement to the coroner. However, not all of these statements were read to the jury at trial. Except for the coroner's statement, only one of which was admitted, the challenged statements were in question and answer format. Flewallen was

permitted to object at trial to particular questions and answers on evidentiary grounds. Thus, if the statements were read, the jury did not hear the objectionable portions. Also, the copies of the statements admitted into evidence were redacted, although the objectionable segments remain legible

Both parties agree that Flewallen was not present when the out-of-court declarations were made and that, neither personally nor through counsel, did Flewallen have a contemporaneous opportunity to cross-examine the declarants. However, Flewallen fully cross-examined all six of the declarants at trial.

In *Mancusi v. Stubbs*, 408 U.S. 204 (1972), the Court emphasized that reliability may be paramount when resolving Confrontation Clause problems. Reliability is not a significant problem in the instant case. First, the declarants were present at trial to verify both that they had made the statements and that the transcripts of the statements were accurate. Second, where more than one statement of a particular witness was admitted, the statements were substantially consistent with one another. The challenged statements of the six witnesses also are substantially consistent with one another and are corroborated in some respects by non-challenged evidence adduced at trial.Third, the declarants' ability to observe the occurrences described in the challenged statements as well as the declarants' accuracy and honesty were fully tested by cross-examination at trial. Finally, in one sense, use of the challenged procedure may have benefited. Flewallen. Normally, when a given question and its answer are objectionable the trial judge can only instruct the jury to disregard them. Here, because the questions and answers were subjected to a "pre-clearance" procedure, the jury never was exposed to objectionable ones.

Nevertheless, under the Due Process Clause of the fourteenth amendment, a state criminal defendant is

entitled to confrontation of opposing witnesses as well as compulsory process for obtaining witnesses, as guaranteed by the sixth amendment. *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence For Criminal Cases*, 91 Harv. L. Rev. 567 (1978) (exploring relationship between these two rights). Thus, subject to permissible restrictions which need not be mentioned here, all criminal defendants generally must be afforded an opportunity to cross-examine adverse witnesses fully and effectively. *Davis v. Alaska*, 415 U.S. 308 (1974); *Smith v. Illinois*, 390 U.S. 129 (1968); *Pointer v. Texas*, *supra*. Here, transcripts of six prosecution witnesses' uncross-examined statements were virtually substituted for the witnesses' direct testimony. However, Flewallen does not cite even a single instance in which this unorthodox procedure hampered his ability to cross-examine the declarants. The record confirms that these witnesses were cross-examined fully and effectively. Thus, although we discourage use of the challenged procedure, it did not prejudice Flewallen's right to cross-examine adverse witnesses fully and effectively.

While primarily securing a criminal defendant's right to cross-examine adverse witnesses, the Confrontation Clause may prohibit the prosecution's use at trial of hearsay. *E.g.*, *Barber v. Page*, 390 U.S. 719 (1968). The Supreme Court has not adopted any particular approach, among several proposals, for "reconciling the Confrontation Clause and the hearsay rules...." *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980). Rather, "[t]he Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.'" *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). In short, the Clause envisions

> 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *Mattox v. United States*, 156 U.S. at 242-43."

*Ohio v. Roberts*, 448 U.S. at 63-64 (footnotes omitted) (second brackets in original).

Accordingly, the Court has developed a two-step process to determine the admissibility of hearsay against a criminal defendant. "First, in conformity with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S. at 65 (citations and a footnote omitted). However, a demonstration of unavailability may not be required where the utility of trial confrontation is sufficiently remote. *E.g. Dutton v. Evans*, 400 U.S. 74 (1970) (*discussed in Ohio v. Roberts*, 448 U.S. at 65 n.7). Second, even when a witness is shown to be unavailable, "[r]eflecting its underlying purpose to augment accuracy in the factfinding process...the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' *Snyder v. Massachusetts*, [291 U.S. 97, 107 (1934)]." *Ohio v. Roberts*, 448 U.S. at 65.

Applying this analysis in *Roberts*, the Court upheld the admission of a transcript of a prosecution witness' preliminary hearing testimony. It found that the testimony bore sufficient indicia of reliability where defense counsel's "questioning [at the preliminary hearing] clearly partook

of cross-examination as a matter of *form*...[and] comported with the principal *purpose* of cross-examination...." 448 U.S. at 70-71 (emphasis in original). The witness was unavailable "despite goodfaith efforts undertaken prior to trial to locate and present [her]." 448 U.S. at 74.

In *California v. Green*, 399 U.S. 149 (1970), a sixteen-year-old was arrested for selling marijuana to an undercover policeman. He named Green as his supplier and so testified at Green's preliminary hearing, at which the witness was extensively cross-examined by defense counsel. However, at Green's trial, the boy was evasive and uncooperative as a prosecution witness, saying he was uncertain whether Green was his supplier. Consequently, the trial court, over Green's objection, permitted the prosecutor to read excerpts from the witness' preliminary hearing testimony both to refresh the witness' recollection and as substantive evidence. Defense counsel was permitted to cross-examine the witness at trial regarding the truth and veracity of his prior testimony, and regarding his present recollection. 399 U.S. at 151-52. Under these circumstances, the Supreme Court found no violation of the Confrontation Clause.

Here, the availability of the declarants, whose hearsay statements were admitted, for full and effective cross-examination at trial satisfies the concerns expressed in *Roberts*, *Green*, and related cases. If a constructively cross-examined, out-of-court statement is admissible under the sixth amendment, as in *Ohio v. Roberts*, then previously uncross-examined statements also must be admissible where, as here, the declarants are subjected to extensive and effective cross-examination at trial.

Although need for the use of the recalcitrant witness' prior testimony clearly was present in *Green*, in terms of accuracy and reliability the instant case is not materially different. Indeed, Flewallen's ability to cross-examine the

declarants probably was greater than that of the defendant in *Green* because the witnesses in the instant case neither professed uncertainty nor expressed hostility. Thus, although necessity may have been absent, there was no error of constitutional magnitude in the instant case.

Finally, to the extent that the sixth amendment secures the right to have the trier of fact observe witnesses' demeanor, the opportunity for the jury in the instant case to do so during cross-examination was sufficient. Although a greater opportunity to observe demeanor may have been preferable, its absence does not render Flewallen's conviction constitutionally infirm.

In conclusion, although we do not condone or encourage use of the procedure challenged here, in the absence of any demonstrated or apparent prejudice to Flewallen occasioned by its use, we conclude that Flewallen's sixth amendment rights were not abridged. Thus, the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

# Appendix B

Per Curiam Opinion

JUDGMENT—WITHOUT ORAL ARGUMENT

**United States Court of Appeals**

For the Seventh Circuit
Chicago, Illinois 60604
May 10, 1982.

Before
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Circuit Judge*
HON. RICHRD A. POSNER, *Circuit Judge*

| | | |
|---|---|---|
| MARION DALE FLEWALLEN, *Petitioner-Appellant,* | ) | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 78 C 707 Judge William E. Steckler |
| No. 81-2323 | ) | |
| *vs.* | ) | |
| GORDON FAULKNER, *Respondent-Appellee.* | ) | |

This cause came before the Court for decision on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

# Appendix C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

| | | |
|---|---|---|
| MARION DALE FLEWALLEN, | ) | |
| | ) | |
| *Petitioner,* | ) | |
| | ) | |
| *v.* | ) | No. IP 78-707-C |
| | ) | |
| GORDON FAULKNER, | ) | |
| | ) | |
| *Respondent.* | ) | |

**ENTRY**

This cause is before the Court on the Petition of Marion Dale Flewallen for Writ of Habeas Corpus and respondent's Motion to Dismiss. The Court having examined said Petition and said Motion, memorandum of Law and the transcript of petitioner's state trial and being duly advised now finds that said Petition should be denied and respondent's Motion should be granted.

Petitioner Marion Dale Flewallen was found guilty of second degree murder in the Vanderburgh Superior Court on March 25, 1976. He has filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254(a). Although petitioner is incarcerated outside this District, his conviction was entered in an Indiana Court within this District and hence this Court has jurisdiction to proceed with a determination of the petitioner's claim. 28 U.S. §2241(d).

Petitioner's sole ground for asserting that he is entitled to

relief is the allegation that at trial his right to confront and cross-examine the witnesses against him was effectively denied and that such effective denial was violative of and contravened his Sixth and Fourteenth Amendment rights. The respondent is the executive officer of the agency to whose custody petitioner was committed upon sentencing. Petitioner appealed his conviction to the Indiana Supreme Court and included the issue raised in his present petition. His conviction was affirmed. *Flewallen v. State*, 267 Ind. 90, 368 N.E.2d 239 (1977). This court has been furnished with a copy of the transcript and record of the proceedings of the trial, and has examined it to supplement its determination of the merit of petitioner's claim.

At trial, the State called twenty-one (21) witnesses to testify. Of these, petitioner claims that six (6) witnesses were merely asked to identify, authenticate and adopt their prior statements to the police and testimony to the Grand Jury, then submit to further perfunctory repetitious direct examination and finally "handicapped" cross-examination. Five (5) witnesses did adopt their prior statements.

The petitioner is correct that the Indiana Supreme Court apparently based its decision largely on the question of hearsay, and relief principally on its decision in *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975). *Flewallen v. State*, *supra* at 241. The State Court made only cursory reference to the separate constitutional question. *Id.*

Petitioner states that the "sole substantive ground raised by petitioner Flewallen in his claim for habeas corpus relief is that the State Trial Court denied him the right to confront and effectively cross-examine the witnesses against him, in violation and contravention of the Sixth and Fourteenth Amendments to the United States Constitution". *Petitioner's Memorandum of Law.*

The pertinent text of the Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

The United States Supreme Court has emphasized that the confrontation clause reflects a preference for face-to-face confrontation at trial and that a primary interest secured by the provision is the right of cross-examination." *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980).

> "The primary object of the Constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief."
>
> *Mattox v. United States*, 156 U.S. 237, 242, 243, 15 S.Ct. 337, 339 (1895).
>
> "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of values furthered by the confrontation clause."
>
> *California v. Green*, 399 U.S. 149, 90 S.Ct., 1930, 1934 (1970).

The confrontation clause does not require excluding the out-of-court statements of a witness who is available and testifying at trial. It does not require exclusion of such statements by a witness who concedes making the statements and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of events in question thus opening himself to full cross-examination at trial as to both version. *California v. Green, supra.*

A careful examination has been made of the trial transcript conisting of three volumes totalling nearly 900

pages.This examination reveals that petitioner was represented by two counsel at the trial which lasted from March 16 to March 23, 1976. It further reveals that each witness, whose prior statements were admitted, took the witness stand at the trial, identified the statement in issue and five (5) conceded the statement was that of the witness. It also reveals that while each statement was read to the jury petitioner's counsel were given an opportunity to object to not only answers but questions as well and that the record is replete with objections which were made and sustained in addition to a voluntary exclusion of many questions and answers by the prosecutor. The introduction and reading of these statements were followed by cross-examination of the witnesses by petitioner's counsel, some of which examinations were lengthy and vigorous. Each witness could be observed by the jury throughout his or her testimony and cross-examination.

While this Court does not endorse the procedure used in this trial, the record clearly demonstrates that it does not infringe on petitioner's rights under the Sixth Amendment to confront witnesses against him as that right has been interpreted by the United States Supreme Court. *California v. Green, supra, Ohio v. Roberts, supra.* This being the sole issue upon which petitioner bases his Petition for Writ of Habeas Corpus, the Court finds that said Petition should be DENIED.

IT IS THEREFORE ORDERED that petitioner's Petition for Writ of Habeas Corpus is DENIED and this cause is DISMISSED.

WILLIAM E. STECKLER, *Judge*
United States District Court

Dated: July 15, 1981

# Appendix D

**Marion Dale FLEWALLEN, Appellant,**

**v.**

**STATE of Indiana, Appellee.**

**No. 976S304.**

**Supreme Court of Indiana.**

**Oct. 14, 1977.**

Defendant was convicted before the Circuit Court, Vanderburgh County, Terre D. Dietsch, Special Judge, of second-degree murder, and he appealed. The Supreme Court, Pivarnik, J., held that: (1) trial court did not err in permitting statements of witnesses for State made to police, coroner and grand jury to be read to jury, in that witnesses were present at trial; (2) defendant failed to show prejudice resulting from question directed to his wife on direct examination by prosecutor whether she had pleaded guilty to charge of cruelty to a child in prior case, or from wife's affirmative answer; (3) defendant failed to show clear error resulting from hypothetical question directed to doctor testifying as defense expert witness which included background fact that defendant had at one time burglarized his parents' home, in that defendant's objection to question was sustained and jury was admonished to disregard question, and (4) any error resulting to defendant when doctor testifying as defense expert witness was allowed to read entire report of another doctor was harmless, in that report was compatible and even supportive of defendant's contention that he was temporarily insane at time of death of his wife's child.

Affirmed.

DeBruler, J., dissented and file opinion.

Rice & Vanstone, Thomas G. Krochta, Evansville, for appellant.

Theodore L. Sendak, Atty. Gen., Lesley A. Bowers, Deputy Atty. Gen., Indianapolis, for appellee.

PIVARNIK, Justice.

Appellant Flewallen was found guilty of the second degree murder of Erica Grigsby, the eighteen-month-old daughter of his wife, Virginia, by a former marriage. At the conclusion of a jury trial in Vanderburgh Circuit Court, appellant was sentenced on March 25, 1976, to life imprisonment.

The evidence was that appellant had beaten the child on occasions previous to her death, and that there were times when Virginia removed her from their apartment overnight for protection from these beatings. Several witnesses testified they saw a sign hanging on the baby's crib with the inscription "Erica is a Monster," and a picture there of a head in a hangman's noose. In the afternoon of August 30, 1974, Virginia went to the bedroom and left Erica in the presence of appellant in the living room. She heard an unusual noise and came running out to find Erica lying at the bottom of the stairs. Appellant was not present. Virginia ran out of the apartment carrying the child, calling for help. Shortly thereafter, appellant was seen outside the apartment by several neighbors. At trial, the physician who performed the autopsy on Erica stated that the cause of death was a puncture wound of the heart produced by a broken rib. In the doctor's opinion, this wound resulted from a forcible blow from a soft instrument, possible a hand, and not from the child's falling down the stairs.

Five specifications of error are submitted to use for review in this appeal: (1) that appellant's motion for discharge should not have been overruled; (2) that the admission of prior statements of several prosecution

witnesses, who were present in court and testifying, violated appellant's right of confrontation; (3) that it was error to allow the prosecutor to ask appellant's wife whether she ever had pleaded guilty to a charge of child cruelty; (4) that appellant's motion for mistrial should have been granted, because of a hypothetical question put by the state to appellant's expert witness which referred to appellant's previous criminal conduct; (5) that questions to appellant's expert by the state improperly incorporated another's diagnosis of appellant's motion condition made at another time.

I

[1] The indictment against appellant was filed on September 19, 1974, and he has been held in jail since that time. All parties agree that delay in coming to trial was occasioned by appellant's actions in moving for a change of venue, which was granted, and further moving for mental evaluation to determine competency to stand trial. During much of this time appellant was incarcerated in Norman Beatty Hospital, and was not returned to the Vanderburgh County Jail until March 4, 1975. On September 17, 1975, the court set this cause for trial by jury for December 1, 1975. Appellant objected to this setting, stating that it was six months after the March 4, 1975, date and that therefore he was subject to discharge under Ind.R.Crim.P. 4(A). Rule 4(A) provides that the defendant is entitled to release *on his own recognizance* after *six months* incarceration if the delay has not been occasioned by his own action. Ind.R.Crim.P. 4(C) provides that if the defendant is held for a total of *one year* with charges pending against him, and the delay not being occasioned by his own action, then he has a right to be *discharged*. The court properly overruled appellant's motion for discharge in this cause.

## II.

[2] Over appellant's objection, the court allowed prior statements of witnesses for the state made to the police, the coroner, and the grand jury to be read to the jury. Although there were some minor conflicts, most of the statements were consistent with the statements giving by the witnesses on the stand, though the previous statements were more detailed in each case. Each witness confirmed that he or she had made the prior statement. Appellant claims that admission of these statements violated his Sixth Amendment right of confrontation.

This issue was decided by this court in *Patterson v. State*, (1976) 263 Ind. 55, 324 N.E.2d 482. The evidence in both *Patterson* and the present case was relevant as it was more detailed and thus more incriminating than the trial testimony of the witnesses. Here, as in *Patterson*, the witnesses were available for cross-examination and for the trier of fact to observe their demeanor and judge their credibility. Thus one of the primary reasons for the application of the old hearsay prohibition is missing; the insusceptibility of the evidence to cross-examination. The presence of the witness for cross-examination also disposes of any confrontation problem, pursuant to the rule of *California v. Green*, (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489. Since all of the witnesses whose prior statements in the form of voluntary statements to the coroner, the police, and grand jury were available at trial, and were in fact cross-examined by the defense, the statements were admissible and no reversible error occurred.

## III.

[3] When Virginia Flewallen testified for the state, she was asked by the prosecutor if she had pleaded guilty to a charge of cruelty to a child in a case in the Vanderburgh Circuit Court. She answered in the affirmative. Appellant

objected to this question and answer, and moved for a mistrial. He argues on appeal that this testimony was improper, irrelevant and prejudicial, since "a husband and wife are often traditionally viewed as a single unit." Thus, the argument goes, this question and answer were meant to portray appellant as a criminal type who was married to a woman who could be cruel to a child, and who therefore sanctioned such behavior on the part of his wife. The state argues that the evidence could just as well be considered favorable to the defense, since it is an admission from the only other person in the apartment at the time of the child's death that she had been found guilty of child cruelty. We agree, and find that appellant has not met his burden of showing prejudice in this alleged error. *Hester v. State*, (1974) 262 Ind. 284, 291, 315 N.E.2d 351, 355.

IV.

In propounding a hypothetical question to Doctor Pontaoe, a defense expert witness, the prosecution included in background facts that appellant had at one time burglarized his parent's home. Appellant objected to this inclusion on the grounds that it was irrelevant, prejudicial, and not within the evidence.The objection was sustained and the jury was admonished by the court to disregard it. In *Young v. State* (1970) 254 Ind. 379, 386-87, 260 N.E.2d 572, 577, this court said:

> "Appellant was not harmed by the answer he objected to. He has overlooked the fact that he filed a plea of not guilty and a special plea of not guilty by reason of temporary insanity. Appellant was examined by psychiatrists who testified at the trial. On a plea of not guilty by reason of insanity appellant opened the door for the admission of testimony as to his entire life, certainly any criminal record he ha[d] and any admissions he may have made relative thereto."

Appellant in this cause also entered a plea of temporary

insanity, and the evidence in question would fall under the same test as *Young v. State*, above.

[4-6] Furthermore, an admonishment to the jury is presumed to cure any error. The granting of a mistrial is within the sound discretion of the trial court and clear error in the court's overruling of a motion for mistrial must be shown to mandate reversal of a conviction. *Dewey v. State*, (1976) Ind., 345 N.E.2d 842. The appellant has the burden of proving that alleged misconduct requires either a mistrial or reversal on appeal. No such clear error appears here since the jury was admonished, creating a presumption of correction of error which has not been rebutted.

V.

[7] While the same expert witness was testifying on cross-examination, the prosecutor asked him if he had examined the report of one Doctor Tullen. The witness stated that he had, and was allowed by the court to give the entire report of Doctor Tullen from the witness stand. Doctor Tullen's report was not inconsistent with the witness Doctor Pontaoe's testimony. It was Dr. Pontaoe's opinion that appellant was temporarily insane at the time of the commission of the act in question, and he further had the opinion that Doctor Tullen's report would confirm this. Doctor Tullen's report contained observations of appellant in 1970, and a diagnosis of appellant as a "sociopathic" personality.

[8] While an expert opinion as to the defendant's mental condition by a person not available for cross-examination is not admissible testimony, such report may be used as a basis of a testifying expert's opinion as to the defendant's sanity if it is in a form that he would normally use in making his professional evaluation. *Smith v. State*, (1972) 259 Ind. 187, 285 N.E.2d 275, *cert. denied* 409 U.S. 1129, 93 S.Ct. 951, 35 L.Ed.2d 261 (1973). It was improper for the

court to permit Doctor Pontaoe to read the entire report including Doctor Tullen's diagnosis. However, we fail to see how doing so in this case in any way prejudiced the appellant. Appellant was urging the defense of temporary insanity, and had presented Doctor Pontaoe to prove that such a condition existed. Doctor Pontaoe testified that after studying the report in question, he believed it compatible and even supportive of his stated opinion that the defendant was, in fact, temporarily insane at the time of the death of this child. Therefore, any error in permitting the reading of the report was harmless.

Since we find no reversible error in these specifications, the judgment of the trial court is affirmed.

GIVAN, C.J. and HUNTER and PRENTICE, JJ., concur.

DeBRULER, J., dissents with opinion.

DeBRULER, Justice, dissenting.

This cause involves the wholesale use of prior testimony and out-of-court statements of less than enthusiastic prosecution witnesses during their direct examination. Five statements given by witnesses to the police, one statement to the coroner, and six sets of grand jury testimony were read, virtually in their entirety, to the jury during the examination of six witnesses. The extrajudicial statements of two of the witnesses were introduced and read only after those witnesses had been questioned as to the events involved and had professed difficulty in remembering those events. *The remaining four witnesses were simply called to the stand for the purpose of authenticating their respective statements and testimony, which were read to the jury before these witnesses were asked any questions about the events surrounding the death of Erica Gribsby.*

The majority sanctions this indiscriminate use of extrajudicial statements by relying on this Court's holding

in *Patterson v. State*, (1975) 263 Ind. 55, 324 N.E.2d 482, that out-of-court statements are not inadmissible as hearsay when the declarant is available at trial for cross-examination. *Patterson* did not consider a criminal defendant's Sixth Amendment right to be confronted with the witnesses against him. The majority "disposes of any confrontation problem" by relying on *California v. Green* (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489. It is true that *Green* contains such language as this:

> "Viewed historically...there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination....
>
> "[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." 399 U.S. at 158, 162, 90 S.Ct. at 1935, 1937, quoted in *Nelson v. O'Neil* (1971) 402 U.S. 622, 626-27, 91 S.Ct. 1723, 1726, 29 L.Ed.2d 222, and *Oritz v. State*, (1976) Ind., 356 N.E.2d 1188, 1194.

I cannot believe, however, that the Supreme Court intended to relieve the State of the obligation to make any attempt to prove its case through the testimony of sworn witnesses given in open court where the trier of fact can observe their demeanor and where cross-examination takes place more or less contemporaneously with the testimony's reception. In *Green* the witness whose out-of-court statement was used was questioned about the facts of the offense but professed a lack of memory as to those facts due to drugs he had taken. The Court was therefore required to choose between permitting substantive evidentiary use of his prior statements and the total loss of relevant and necessary evidence. The danger of losing such evidence, in the *Green* Court's view, warranted admission

of the statements despite diminished confrontation protection.

No one seriously asserts that cross-examination as to extrajudicial statements is the full equivalent of cross-examination of testimony given at trial; the most that is attributed to such substitute confrontation is that it is to be preferred to the loss of the evidence contained in the extrajudicial utterance.

> "The most essential difficulty with the claim that cross-examination is 'by hypothesis' not requisite when the prior contradictory declarer is physically present is this. It denigrates the real office of cross-examination. Cross-examination postulates a witness who avows a thing under interrogation by a lawyer who would have him deny it, or a witness who denies a thing under inquisition by lawyer who would have him affirm it. Cross-examination is thus essentially adversary. Cooperation is the antonym of cross-examination. The measure of the cross-interrogator's success is the extent to which he is able to destroy the witness's testimony in chief, shake the witness, elicit retractions, destroy his credibility. If the witness declines to adopt his former statement as true, no adversary, cross-examination about it is possible." Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*,3 Ind.L. Forum 309, 317-18 (1970) (Footnote omitted); See also Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A.Rev. 43, 53 (1954).

As the Minnesota Supreme Court noted:

> "The chief merit of cross-examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is the immediate application of the testing process. Its strokes fall while the irons is hot." *State v. Saporen*, (1939) 205 Minn. 358, 362, 285 NW. 898, 901.

The Michigan Supreme Court has said of cross-examination as to extrajudicial statements:

> "The would-be cross-examiner is not only denied the right t be the declarant's adversary, he is left with no choice but to become the witness' friend, protector and savior. Though he may be permitted to ask questions in the form of cross-examination, the substance of his effort will be redirect examination and rehabilitation. The reason is simple. The witness cannot recant. Every cross-examiner tries to bring the witness to the point where he changes his story—literally eats his words—in the presence of the jury...No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement stands. His questions will always sound like attempts to permit the witness to explain *why* he has changed his story before coming to court, with the jury being left to infer that he might have been induced to change his story in the intervening months or years, for some unrevealed and sinister reason." *Ruhala v. Roby*, (1967) 379 Mich. 102, 125, 150 N.W.2d 146, 156.

Where no effort to elicit testimony from the witness concerning the facts in issue is made at trial, no such compelling reason exists for dispensing with the safeguards our legal system provides for assuring the trustworthiness of evidence: the oath, observation of the witness' demeanor, and contemporaneous cross-examination. Permitting such evidence will cause criminal trials in this state to resemble trials in the English prerogative courts, whose reliance on *ex parte* affidavits to convict accused persons was a principal evil sought to be remedied by the constitutional guarantee of confrontation of one's accusers. See *California v. Green*, *supra*, 399 U.S. at 156-157 nn. 10-11, 90 S.Ct. 1934.

Office - Supreme Court, U
FILED
SEP 9 1982
ALEXANDER L. STEVA
CLERK

No. 82-238

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

MARION DALE FLEWALLEN,
*Petitioner,*

vs.

GORDON FAULKNER,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
*Attorney General of Indiana*

DAVID A. ARTHUR
*Deputy Attorney General*

OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332

*Attorneys for Respondent*

Central Publishing Company, Inc., Indianapolis, IN 46204

## QUESTION PRESENTED FOR REVIEW

Whether the Petitioner was denied his Sixth and Fourteenth Amendment rights to confront and effectively cross examine the witnesses against him.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented for Review | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Opinions Below | 2 |
| Statement of the Case | 2 |
| A. Nature of the Case | 2 |
| B. Course of the Proceedings Below | 2 |
| Statement of the Facts | 2 |
| Reasons for Disallowance of the Writ | 3 |
| Conclusion | 6 |

## TABLE OF AUTHORITIES


| *Cases:* | Page |
|---|---|
| *California v. Green*, 399 U.S. 144 (1970) | 3,4,5,6 |
| *Flewallen v. Faulkner*, 677 F.2d 610 (1982) | 5 |
| *Mattox v. United States*, 156 U.S. 237 (1895) | 3 |
| *Amendments To The United States Constitution* | |
| Sixth Amendment | 3,6 |
| Fourteenth Amendment | 3 |

No. 82-238

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

MARION DALE FLEWALLEN,
*Petitioner,*

vs.

GORDON FAULKNER,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Gordon Faulkner, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit"), thereby refusing to review the decision entered by that Court in Cause Number 81-2323 on May 10, 1982.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 677 F.2d 610. It also is reported in the appendix to the Petition for Writ of Certiorari (hereinafter "Petition").

The opinion of the United States District Court for the Southern District of Indiana (hereinafter "District Court") is an unpublished opinion and appears in the appendix of the Petition.

The opinion of the Indiana Supreme Court is reported at 289 Ind. 70, 338 N.E.2d 239. It is also reprinted in the appendix to the Petition.

## STATEMENT OF THE CASE

### A.

### NATURE OF THE CASE

This Petition arises from a decision of the Seventh Circuit, affirming an order of the District Court that denied Petitioner relief in an action filed by him under 28 U.S.C. §2241 *et seq.*

### B.

### COURSE OF THE PROCEEDINGS BELOW

Respondent accepts the portion of the Petitioner's Statement of the Case, contained in the Petition for Writ of Certiorari, which deals with the prior proceedings in the federal courts.

### STATEMENT OF THE FACTS

Respondent accepts the portion of the Petitioner's Statement of the Case, contained in the Petition for Writ of Certiorari, which deals with the facts of the case.

## REASONS FOR DISALLOWANCE OF THE WRIT

At Flewallen's criminal trial the prosecutor was permitted to admit into evidence and to read from transcripts of out of court statements of six prosecution witnesses. Flewallen was permitted to object to particular questions and answers and if the objection was sustained the jury did not hear the objectionable portions. Flewallen also fully cross-examined all six of the witnesses. The sole issue presented for review by this Court is whether or not Flewallen was afforded his Sixth and Fourteenth Amendment rights to confront his accusors.

As Flewallen states in his brief, the leading case dealing with the rights to confrontation in these circumstances is *California v. Green*, 399 U.S. 144 (1970). In *Green* this Court concluded, after reviewing *Mattox v. United States*, 156 U.S. 237 (1895), that "(v)iewed historically...there is good reason to conclude that the confrontation clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *California v. Green, supra*, at 159. This Court further stated that:

> This conclusion is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.
>
> (*California v. Green, supra*, at 159).

The out-of-court statements may have been made under circumstances subject to none of the enumerated protections. However, "if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes retains most of the lost protections." *Id*, at 159.

> As far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury...
>
> * * *
>
> Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured a full and effective cross-examination at the time of trial.
>
> (*California v. Green, supra*, at 159-160).

Reviewing the three purposes for the confrontation clause enumerated in *Green* in light of the facts in this case it is apparent that the United States Court of Appeals for the Seventh Circuit correctly decided that the procedure followed by the state trial court did not violate Flewallen's Sixth and Fourteenth Amendment rights. For example, in this case each declarant was present and testified at trial, was under oath at that time, was subject to cross-examination, and jurors could observe the demeanor of the witness.

Flewallen attempts to distinguish this case from *Green* by asserting that, in *Green*, "the confrontation requirements of oath and demeanor were satisfied by the State's witness' subjection to a formal oath at the time he made his challenged statement..." (petition at p. 14). However, in *Green* this Court specifically stated that where, as in the instant case, the declarant must, at trial, "affirm, deny, or qualify the truth of the prior statement under the penalty of perjury" *California v. Green, supra*, at 160, then the oath requirements of the confrontation clause have been met.

Flewallen further seeks to distinguish this cause from *Green* on the basis that the statements in *Green* were given "during a formal preliminary hearing made under oath in circumstances which closely approximated those of the typical trial." (Petition at page 15). However, read in context it is clear that although this Court did address this question it did so as an alternative theory and did not rely on it as the basis for its decision. It is clear from examining the language cited by Flewallen in context that this Court had already determined that the procedure followed in *Green* was constitutionally adequate whether or not the statements had originally been made under circumstances approximating a trial. *Green v. California, supra,* at 165-166.

Flewallen also seeks to distinguish this case from *Green* on the question of whether there was sufficient opportunity for cross-examination and whether the jury was able to observe the demeanor of the witnesses. There is no doubt that Flewallen had a full and fair opportunity to cross-examine each of the six witnesses at trial "...Flewallen does not cite even a single instance in which this unorthodox procedure hampered his ability to cross-examine the declarants." *Flewallen v. Faulkner,* 677 F.2d 610 at 612.[1] However, as this Court established in *California v. Green,* "...the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance *as long as the defendant is assured of a full and effective cross-examination at the time of trial." California v. Green, supra,* at 160 (emphasis added).

---

[1]Indeed, the Court of Appeals correctly noted that in some respects, "use of the challenged procedure may have benefited Flewallen...because the questions and answers were subjected to a 'preclearance' procedure, the jury never was exposed to (objectionable questions and answers)" *Flewallen v. Faulkner,* 667 F.2d at 612.

Neither does the fact that the jury was unable to observe the demeanor of the witnesses at the time they made their original statements violate the Sixth Amendment. The jurors in this case were able to observe the demeanor of these witnesses at trial which is all that was available in *Green*. The jury may observe and evaluate the witness' demeanor as he disavows, qualifies or affirms his previous statement. Flewallen complains that in this case he could only observe witnesses "who claimed to have forgotten most of their previous statements" (Petition at p. 14). However, even if we accept this as an accurate statement of the facts, it would also apply to *Green*. In that case the witness Porter's statement was used by the prosecution precisely for the reason that Porter was evasive and claimed he was uncertain how he had obtained the drugs and that he was unable to remember the events that followed his telephone conversation with the defendant.

The Seventh Circuit was correct in determining, in light of the facts, that Flewallen's Sixth Amendment rights were not abridged. The Seventh Circuit ruling in this case is in no way inconsistent with this Court's holding in *California v. Green* and there is no reason for this Court to grant a writ of certiorari in this case.

## CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LINLEY E. PEARSON
*Attorney General of Indiana*

DAVID A. ARTHUR
*Deputy Attorney General*

OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332

*Attorneys for Respondent*